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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as domestic social development, fair employ-

ment and anti-discrimination policies, family life, and the rights of the unborn. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the Church are the protection of the dignity of work, family life, equal opportunity, and unborn life. These interests are implicated in the instant case.

This case presents novel, sensitive, and complex public policy concerns for the Court. This *amicus* has long supported efforts here and elsewhere to oppose employment discrimination; all persons must have full opportunity to work with safety and dignity. In addition, when unborn lives are threatened with injury, this *amicus* has supported efforts to protect them. Here, some would propose the Court create conclusive presumptions favoring one or the other interest. Some would simply side with the employee and void all efforts to protect the unborn; others might seek to void consideration of women's equal employment interests to protect those who might be conceived. This *amicus* rejects both absolutist approaches. Rather than engage in a discussion about whether and to what extent rights are in conflict, this Court should seek ways that oblige employers to take into account the lives and safety of workers *and* their unborn children. We insist that equal employment opportunity for all individuals cannot come at the expense of threats to their children.

The particular purpose to which this Brief is addressed is limited. Petitioners and their *amici* assert that no corporate policy expressly considering protecting children yet to be born from workplace toxin exposure to their mothers may withstand scrutiny as a bona fide occupational qualification under Title VII of the Civil Rights Act of 1964. Moreover, they imply that such consideration, even if legal, would be unwise social policy. Without compromising any of our traditional policies and

interests, this *amicus* writes only for the limited purpose of showing that such a policy may be not only reasonable but lawful under the Title VII bona fide occupational qualification defense.[1]

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

Progress always has a price. Who should pay this price is a question that the greater society and the government constantly face. In the formative years of American industry, unfortunately, it was workers, their families, or the public that bore the risks. As but one example, the tort system required proof of direct cause or privity before the burdens of progress were shifted to industry. In this century, we have come to recognize that that system was unfair and did not adequately distribute the risks and costs that accompanied the not yet understood consequences of an increasingly more complex industrial and technological era. For this reason, government, through legislation or regulation, began first to protect workers, then others, from these risks. As knowledge of these risks increased, American business shouldered more and more of its proper responsibility.

Our products and production systems cause problems that transcend the present—beyond factories and workers to the environment and even, through consequences to the genetic character of workers or through long-lasting

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[1] The court below held that concern for the health and safety of unborn children was also a legitimate and proper concern in evaluating Respondent's business necessity defense. Because of the policy's facially disparate treatment of women workers, this *amicus* assumes that the fetal protection policy is more logically scrutinized under the bona fide occupational qualification defense rather than business necessity which is generally utilized in disparate impact cases. *See amicus curiae* Brief for the United States and the Equal Employment Opportunities Commission.

toxins, to generations yet to be born. Governmental reaction to the demand for increased protection for the public's health and safety has resulted in minimizing, or even prohibiting, toxins and other agents likely to cause great harm. No one asserts, here or elsewhere, that this concern is unwise or improper. This interest is reflected in numerous laws and policies at both the federal and state level which have as a goal the broad protection of the public, including in that "public" those who are yet to be born. Although diverse in source and content, together these laws and policies reflect society's intention that the next generation has the chance to be born in good health. Employers are particularly well-situated to contribute to the realization of this social goal. Their expertise with respect to their products and working conditions, as well as their ability to respond quickly to changing scientific and technological knowledge, makes them necessary contributors to policies ensuring workplace safety.

Against that complex background, this Court must construe Title VII, a remedial statute designed to combat workplace discrimination. Discriminating practices cannot substitute for investment in and effective application of workplace safety measures. In this case, Respondent Johnson Controls recognized that the unalterable presence of lead in its battery making operations created a hazard to children who might be born to its women employees. No one seriously contests that risk. What is contested is Johnson Controls' remedy—the exclusion of women of childbearing capacity from its battery making operations under a "fetal protection policy." In response to a Title VII claim, the company argues, among other things, that this exclusion is a bona fide occupational qualification or "bfoq." Although the articulation and implementation of fetal protection policies involve resolution of difficult and complex public policies involving the dignity and status of women workers, operation of the civil rights statutes, and legal status of the unborn, none of these issues goes

to the core of the statutory question presented. This *amicus* writes solely to explain how and why express consideration of the health and safety of those yet to be born is a valid consideration in construing Title VII and its bfoq defense.

The plain language of the bfoq defense, "reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. § 703(e)(1) (1982), permits employers to consider the health and safety of third parties, including the offspring of their employees, when formulating employment policies. This Court has recognized the need to safeguard persons other than employees as a relevant and legitimate employment goal in Title VII cases. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977), *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), and *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979). That Title VII is a remedial civil rights status is of no moment. Federal handicap discrimination laws permit employers to act based upon concerns about the safety of persons other than employees. Workers posing a direct threat to the safety of others because of an infectious disease or because of current alcohol or drug abuse are not considered to be otherwise qualified to perform the tasks of employment. 29 U.S.C. § 706(8)(B), (C) (1982).

When Congress passed the Pregnancy Discrimination Act, 92 Stat. 2076 (1978) ("PDA"), it did not intend to exclude safety concerns as relevant to the bfoq defense. At the time of passage of the PDA, Congress was well aware that courts permitted employers to consider public safety in Title VII cases. It is unreasonable to presume that Congress would have permitted this socially accepted goal to be discarded *sub silentio*, in the face of its action on numerous other environmental and workplace rules designed to protect broadly the public. Indeed, performance-related considerations permitted employers under the PDA *include* the safety of third parties. The legisla-

tive history of the PDA indicates that Congress intended the bfoq provision to operate as it had prior to the PDA, when third party safety was well-recognized to be relevant to businesses' "normal operation." Properly viewed in this context, the law permits companies whose workplace risks transcend the present workforce to evaluate those risks in setting its policies. Such a result is valid under Title VII and fully comports with broader social demands and trends.

ARGUMENT

I. EMPLOYERS ARE PROPERLY OBLIGED TO PROTECT BROADLY WORKERS AND THE PUBLIC, INCLUDING FUTURE GENERATIONS, FROM SUBSTANTIAL AND FORESEEABLE HARM.

Protecting the unborn (in the context of the instant case) is described as "otherwise laudable" and an "otherwise perfectly legitimate, and indeed [a] praiseworthy, ethical and moral concern[]."[2] Notwithstanding their admission of society's interest in the welfare of the unborn, Petitioners would deny that employers may legitimately be permitted under Title VII to implement a fetal protection policy. Petitioners urge this Court to rule such policies forbidden by Title VII and declare them practically unwise, claiming they will lead to "poor social decisionmaking."[3] That claim ignores a consistent and wise public policy that generally accords great value to protection of the unborn.

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[2] Pet. Brief at 34 and 36. *See also amicus curiae* Brief for the United States and the Equal Employment Opportunities Commission at 16 n.13 (hereinafter, "Brief for the United States"), affirming the social value of fetal protection.

[3] Pet. Brief at 37. Petitioners' former claim is treated in Part II.A and B; the latter is answered here.

A. Law and Policy Demonstrate a Strong Public Interest in Protecting the Health and Safety of the Unborn.

The health and safety of the next generation is a matter of preeminent concern for every generation. American society expresses its concern about the health and welfare of the next generation in a variety of ways.[4] In addition to protective laws, numerous non-coercive public policies and decisions demonstrate the important place accorded the welfare of the unborn. Referencing these various sources, a consistent public policy protecting the health and safety of the next generation emerges.[5] "No one can treat lightly the possibility of injury to future children, who cannot protect themselves or participate in the decisions that will govern their lives." *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 914 (7th Cir. 1989) (Easterbrook, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990) (No. 89-1215).

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[4] The United States has formally expressed very publicly its commitment to the life and health of unborn children by endorsing the United Nations' Declaration of the Rights of the Child, acknowledging that:

> [T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*

General Assembly of the United Nations, *1959 Declaration of the Rights of the Child*, preamble (adopted Nov. 20, 1959) (emphasis added).

[5] The rulings of this Court constitutionalizing abortion are the main exception to this public policy. Although abortion is not determinative in the present issue, which concerns the permissibility of private employers' considering fetal protection policies under Title VII, it colors arguments that tend to lessen concern for the unborn. This Court has never held that the Constitution requires indifference to the potential for substantial harm to the unborn, but, rather, has found that society has a legitimate interest in protecting unborn life. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3057 (1989); *Harris v. McRae*, 448 U.S. 297, 314 (1980).

The health of the next generation is so significantly affected by parents' total environment, including work life, that public health specialists urge both prospective parents to pay adequate attention to their individual health and safety before conception as a way to give birth to healthy children.[6] The Department of Health and Human Services supports that conclusion:

> In relation to the total life span of the individual, the early developmental years are short and serve as the foundation for the remainder of one's life span. The needs of a child in the support of this growth and development begin *before birth* and continue throughout the growth years until maturity is reached.[7]

For this reason significant amounts of limited available medical resources are devoted to prenatal surgery to promote healthy children even before birth. Sophisticated operations may be performed *in utero*.[8] Substantial re-

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[6] Comm. on Maternal Health Care and Family Planning, Maternal and Child Health Section, American Public Health Association, *Ambulatory Maternal Health Care and Family Planning Services: Policies, Principles, Practices*, 30 (1978).

[7] U.S. Dept. of Health and Human Services, Office of Human Development Services Administration for Children, Youth and Families Research, Demonstration and Evaluation Division, *The Status of Children, Youth and Families 1979*, 30 (DHHS Publication No. (OHDS) 80-30274, Aug. 1980) (emphasis added). The federal government further seeks to protect the unborn through the Department of Health and Human Services' fetal experimentation policies. *See* 45 C.F.R. § 46.208 (1989). Beginning in 1985, Congress explicitly prohibited federal approval of any research that would allow substantial risk to the unborn in the pursuit of important medical knowledge that cannot be obtained by other means. Health Research Extension Act of 1985, Pub. L. No. 99-158, 99th Cong., 1st Sess. § 2 (1985). This applies even to unborn children scheduled for abortion. *See also* L. Wardle, C. Blakesley & J. Parker, *Contemporary Family Law: Principles, Policies, and Practices*, § 6:17 at 93 (1988) (listing states' fetal experimentation policies generally following the federal model).

[8] *See, e.g.*, Harrison, *et al.*, *Successful Repair in Utero of a Fetal Diaphragmatic Hernia after Removal of Herniated Viscera*

sources have been applied, too, to more common maladies suffered *in utero* resulting in low birth weight and the various effects of poor maternal nutrition.[9]

In recognition of these concerns, states have traditionally extended protection to unborn life by permitting recovery for prenatal injuries:

> The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth an action will lie for his wrongful death.[10]

Recovery is allowed regardless of whether the child was injured before or after viability.[11] Further expanding this policy, a majority of jurisdictions allow recovery

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from the Left Thorax, 322 New Eng. J. Med. 1582 (May 31, 1990); Clewell, *et al.*, *A Surgical Approach to the Treatment of Fetal Hydrocephalus*, 306 New Eng. J. Med. 1320 (June 3, 1982).

[9] Brown, *Can Low Birth Weight be Prevented?*, 17 Family Planning Perspectives 125 (May/June, 1985) (Principal maternal risk factors associated with delivering underweight infants include "toxic exposures, including occupational hazards." Notes that "some experts have suggested that more attention be given to health assessment of women *before* they become pregnant, to identification of risk factors and, where possible, to interventions for reducing them") (emphasis added).

[10] W. Keeton, *et al.*, *Prosser and Keeton on the Law of Torts*, § 55 (5th ed. 1984) (footnotes omitted); *See* Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971).

[11] *See, e.g., Group Health Ass'n v. Blumenthal*, 453 A.2d 1198 (Md. 1984); *Shack v. Holland*, 389 N.Y.S.2d 988 (1976); N.D. Cent. Code § 12.1-17 (Save abortion, killing an unborn is feticide from conception forward). *See also, Prosser and Keeton on the Law of Torts* ("With recent advances in embryology and medical technology medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether"). *Id.* at 369 (footnote omitted).

even if the child is stillborn,[12] and even if the injury takes place preconception.[13] These expansions reflect increased willingness to acknowledge a duty of care to those yet to be born.[14]

B. Society Demands That Employers Be Obliged to Protect the Health and Safety of Workers and the Public, Including Those Yet to Be Born.

For most members of society, worklife constitutes the greater part of the day. Potentially, therefore, one's working conditions have a greater impact upon that individual's health and safety—including the health and safety of his or her offspring—than any other environmental factor.[15] From this perspective, it is not only good public policy but necessary that employers be obliged to exercise responsibility for the effect of working condi-

[12] *See, e.g., Amadio v. Levin*, 501 A.2d 1085, 1087 n.3 (Pa. 1985) (holding child born dead can maintain survival and wrongful death action for injuries suffered while *en ventre sa mere* and citing other jurisdictions permitting similar recovery); *Crooks v. Williams*, 508 A.2d 912 (D.C. 1984) (damages for negligence leading to stillbirth in 8th month of pregnancy).

[13] *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977) (Infant has the right to be born free of prenatal injuries which were foreseeable from preconception blood transfusion to mother); *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237, 239-40 (10th Cir. 1973). *Bergstresser v. Mitchell*, 577 F.2d 22, 26 (8th Cir. 1978); *In re Agent Orange Products Liability Litigation*, No. MDL-381 (E.D.N.Y. May 14, 1979).

[14] Increasingly, states are also according unborn children rights to recover child support. *See, e.g., Doe v. Roe*, 543 So.2d 741, 749 (Fla. 1989), *cert. denied*, 110 S. Ct. 405 (1989) ("[I]t was critical to the well being of the child that the unwed father provide prebirth support"); *Brown v. Snyder*, 1989 WL 155738 (Ohio App. Dec. 21, 1989) (Westlaw Allstates Database) (Father owes retroactive child support and prenatal and birth expenses).

[15] Petitioners specifically acknowledge the possibility of harm to workers and their offspring in the instant case. *See* Pet. Brief at 5, 6, and 7.

tions upon health and safety. Moreover, Americans have specifically demanded that companies exercise ever greater responsibility for consequences of their businesses that may affect the public. Employees and their unions have led the cause for regulation to safeguard the health and safety, not only of employees, but of third parties including their families.[16] As one commentator has aptly noted: "Indeed, as the country has become increasingly burdened by industry's hazardous products, byproducts, and wastes, government increasingly has required, at substantial expense to industry, that health, including fetal health, become a corporate concern."[17] This trend has continued unabated as corporations have been obliged to implement protective measures for society's health and safety. Adoption of fetal protection policies is consistent with their obligation to behave responsibly toward *all* members of society they affect. Petitioners' arguments to the contrary are inconsistent with this widespread call for employer responsibility.

[16] It is worth noting that union officials have specifically recognized the importance of safety measures for the unborn. In 1989, union officials, including the president of the Public Employees Department of the AFL-CIO and the president emeritus of the International Ladies Garment Workers Union, recognized the importance of responsibility toward children beginning before their birth:

> Investments in children and their families are essential to this nation as we head into the next century. . . . As important, our prevention principle has the greatest meaning here: a dollar spent in early life to prevent early damage yields substantial savings for the society and for the individual downstream.
>
> The investment must begin before the child is born.

American Assembly, *The Final Report*, 13 American Family 12, 13 (Jan. 1990).

[17] Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Goals under Title VII*, 69 Geo. L.J. 641, 645 (1981).

Employers are obliged to maintain certain minimum safety standards in the workplace not just for the benefit of employees, but for their families, their children, and the public. *See, e.g.*, Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651-78 (1982);[18] Toxic Substance Control Act of 1976, 15 U.S.C. §§ 2601-29 (1982). To protect customers, their offspring,[19] and persons harmed by manufactured products, Congress established the Food and Drug Administration to prohibit the use of adulterated or misbranded foods, drugs, and medical devices. Employers have been further legislatively required to consider the safety of consumers through the Consumer Product Safety Act. 15 U.S.C. §§ 2051-83. Significantly, in that Act, Congress recognized employers' expertise in protecting consumers: "[T]he products' complexity and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately." 15 U.S.C. § 2051(a)(2). The pattern of statutory activity shows that public policy has consistently extended the reach of corporate obligations, beyond the range of workers or customers, to the public at large.[20]

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[18] Significantly, while Congress recognized the coercive power of the OSHA concerning worker health and safety, it also expressed hope that the Act would cause employers to act upon their own initiative as well. 29 U.S.C. § 651(a)(1)(4)(13) (1982).

[19] In 1971, the Food and Drug Administration ("FDA") withdrew its approval of diethylstilbestrol ("DES") for use during pregnancy after scientific findings indicated its dangers to the offspring of women who had ingested it. *See Shields v. Eli Lilly & Co.*, 895 F.2d 1463 (D.C. Cir. 1990) (FDA banned DES after evidence linked it to development of clear-cell vaginal cancer in women whose mothers took it during pregnancy).

[20] The series of environmental obligations placed on businesses arising from "normal operations" involving the discharge or disposal of waste indicates the shift in concern to an increasingly broad range of potential victims. *See* Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601-57 (1982).

Thus the law has made employers increasingly accountable for personal health and safety not only of customers but the public. Products liability law reflects this trend. Since the early 1900's the "frequency and severity of products liability actions have been massive, no matter the system of accounting."[21] Additional developments in this area of the law have made manufacturers increasingly responsible for the safety of consumers and others.[22]

Employers are uniquely well-situated and ethically compelled to contribute to protecting their employees' offspring. Employers are "experts" with respect to the product or service they offer. They are well-positioned to expend research and development funds to determine how to conduct business most safely.[23] Because they understand their businesses, employers are also able to respond most quickly to changes in the science or technology their businesses involve without the need for complex administrative and regulatory processes often required by federal or state health and welfare agencies.[24] In this effort,

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[21] Epstein, *The Unintended Revolution in Products Liability Law*, 10 Cardozo L. Rev. 2193 (1989). From 1974 to 1985, the number of products liability cases filed in federal district courts alone increased by 758% from 1579 to 13,55[illegible] S. Rep. No. 422, 99th Cong., 2d Sess. 6 (1986).

[22] *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697 (1963) (strict liability theory adopted in products liability actions); *See also* Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Cracked*, 25 Gonz. L. Rev. 205, 205-207 (1990); *Prosser and Keeton* at 703; *The Restatement (Second) of Torts*, § 395 (1965) (manufacturer is liable to "those whom he should expect to be endangered by [the product's] probable use").

[23] Judge Easterbrook in his dissent below notes: "An employer is better situated than his workers to gather and interpret scientific data." 886 F.2d at 914. Petitioners acknowledge employers' expert status with respect to their products. Pet. Brief at 35 n.31.

[24] *See* 886 F.2d at 899 (Johnson Controls acting upon new evidence that lead levels *below* OSHA standards can harm unborn children).

employers can and should consult firsthand with their employees and their unions who are also very knowledgeable about the practices and hazards of their workplace.[25]

The above examples illustrate that providing appropriate protection for the next generation does not come without sacrifices in the present. Different segments of society bear the responsibility in different contexts for the various safety measures which must be undertaken to safeguard the next generation. Many policies benefiting unborn children are at the same time beneficial to their mothers and fathers. In many instances, as has been demonstrated, employers properly are obliged to bear the predominant costs. In other instances, however, parents bear the burden associated with protecting their unborn children. Ultimately, the burden of protecting the health of future generations should be equitably shared with the parents through the cooperative action of industry and the government. Until that day, that the burden may fall on one or the other responsible party is not, alone, grounds for a conclusion that unlawful discrimination is occurring.

II. PREVENTING THE SUBSTANTIAL RISK OF HARM TO UNBORN CHILDREN FROM EXPOSURE TO LEAD IS A RELEVANT AND LEGITIMATE CONCERN IN EVALUATING AN EMPLOYER'S BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE UNDER TITLE VII.

Johnson Controls excludes women of childbearing capacity from its battery assembly operations as a means of reducing lead exposure to children who might be born to those women. Both parties here agree that lead poses "a *substantial* health hazard to the unborn child in the womb." *International Union, UAW v. Johnson Controls,*

[25] OSHA has, in fact, recognized this latter possibility and specifically encouraged employers to involve employees in developing safe workplace policies. *See* 29 U.S.C. § 651(a)(1)(4)(13).

Inc., 886 F.2d at 879 (emphasis in original). The court concluded that the exclusion under a so-called "fetal protection policy" was "proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead," *id.* at 898-99, and therefore was a bona fide occupational qualification [26] under Title VII. Fetal protection policies present novel and complex questions which will test Title VII's flexibility:

> [A]n employer should not have an absolute right to express its interest in fetal health in any way it chooses and [] the woman employee should not have an absolute right to choose the risk to which she will expose her fetus. The employer does, however, have a legitimate interest in fetal health that should be allowed some form of expression without liability under the equal employment opportunity laws. At the same time women workers have an interest in equal employment opportunity that is threatened by employer exclusionary policies. Women workers also have an interest in protecting their fetuses from harm while protecting employment rights. Thus, even if one accepts the employer premise that the choice presented is between the fetus' right to health and the woman's right to employment, a look at the various interests involved suggests that some compromise of the competing interests should be sought in any resolution of the conflict under title VII.[27]

[26] *See* note 1, *supra*. Even if Respondent's policy were measured in the context of business necessity, concern for the health and safety of the unborn would be a significant relevant factor to be taken into consideration. Both defenses, bfoq and business necessity, have generally developed in the context of job-relatedness (*i.e.*, effective job performance), and have included safety as a relevant consideration. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) (business necessity); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (bfoq).

[27] Williams, *supra* note 17, at 653. For the reasons stated in the text of this Part, this *amicus* disagrees with the author's ultimate conclusion that fetal protection policies can be successfully

The relevant Title VII analysis provides a useful mechanism for evaluating facially discriminatory fetal protection policies by balancing legitimate competing interests.[28]

Title VII affirmatively outlaws discrimination against workers; properly, the rule is broad and the defenses are narrow. In determining its scope and reach, this Court has recognized that Title VII plainly involves a "balance of rights." *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 (1989). In this case, the court below concluded that the bona fide occupational qualification ("bfoq") defense under section 703(e)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1) (1982), must be construed to give "meaningful and thoughtful consideration to the *interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child.*" 886 F.2d at 893 (emphasis in original). This common sense conclusion is supported by the language of the bfoq provision itself, and by judicial interpretations of Title VII and other civil rights statutes.

A. Health and Safety Concerns, Including Potential Harm to the Unborn, Fall within the Meaning of the Bona Fide Occupational Qualification Provision of Title VII.

Whether a fetal protection policy may be a bona fide occupational qualification within the meaning of section 703(e)(1) of Title VII must begin with the language of the statute itself. *Westside Community Board of Educa-*

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defended only as a business necessity but not as a bona fide occupational qualification. *See* note 1, *supra*.

[28] It is not our intention here to evaluate the appropriateness of the particular fetal protection policy at issue here, or the application of available Title VII defenses to it. This will be done by the parties. In addition, there are serious procedural and tactical questions involved in this particular case that make it difficult for this *amicus* to make such an evaluation. For whatever reason, Petitioners "failed to present even one specific alternative to Johnson's fetal protection policy." 886 F.2d at 892.

tion v. Mergens, 110 S. Ct. 2356, 2365 (1990). On its fact, section 703(e)(1) permits sex to be a bona fide occupational qualification only in those limited situations in which it can be demonstrated to be "reasonably necessary to the *normal operation* of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (emphasis added).[29] In business, "operation" is commonly understood as "the whole process of planning for and operating a business or other organized unit." *Webster's Third New International Dictionary* 1581 (4th ed. 1976). "Normal" is synonymous with "regular." *Id.* at 1540. There is no gainsaying that health and safety concerns should be and are a "regular" part of the "whole process of operating a business." *See* discussion in Part I, *supra*. If those safety concerns are related exclusively to one sex or another, sex may be a legitimate basis on which to qualify people for work. In this case, it may be "possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal." 886 F.2d at 904 (Posner, J., dissenting). That health and safety concerns are a relevant consideration in determining the applicability of a bfoq defense is amply supported by precedent.

In *Dothard v. Rawlinson*, this Court held that sex was a bona fide occupational qualification for the position of

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[29] In relevant part section 703(e)(1) provides that "[I]t shall not be unlawful employment practice for an employer to hire or employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). The language of this provision provides no basis to distinguish, as Petitioners attempt (Pet. Brief at 31 n.29), between safety concerns relating to customers and employees on the one hand, and safety concerns relating to others (*e.g.*, the public including the unborn) on the other.

correctional counselor in contact positions in male maximum security facilities housing a significant number of sex offenders. 433 U.S. 321, 334 (1977). Recognizing that "the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex," it nonetheless concluded that the regulation at issue fell "within the narrow ambit of the bfoq exception." *Id.* The Court noted that "[m]ore is at stake in this case, however, than an individual woman's decision to weigh and accept risks of employment in a 'contact' position in a maximum security male prison." *Id.* at 335. A significant part of the Court's rationale was that the "likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victims of the assault but also to the basic control of the penitentiary *and protection of its inmates and the other security personnel.*" *Id.* at 336 (emphasis added). Clearly the Court in *Dothard* recognized both that concern for the safety and protection of persons other than the employee is relevant and that sometimes the sex of the worker may be a qualifying factor when scrutinizing a bfoq defense.[30]

Later decisions of the Court continued this approach. In *Western Air Lines, Inc. v. Criswell*, the Court rejected an age requirement (under 60) for flight engineers as a

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[30] Significantly, the Court in *Dothard* also found that safety was a relevant consideration when evaluating business necessity defenses under disparate impact claims. 433 U.S. at 331 n.14 ("a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge"). The concept of effective job performance must include consideration of potential harm to others as a relevant consideration in any context. Because job-relatedness is a significant consideration in both business necessity and bfoq analysis, cases decided under either analysis are relevant insofar as safety considerations are taken into account.

bfoq defense under the Age Discrimination in Employment Act of 1967 ("ADEA"). 472 U.S. 400 (1985). The Court recognized that the airline had a legitimate interest in alleviating safety risks but held that it had failed to adopt a "reasonably necessary" means of achieving that goal. Importantly for analytical purposes here, the Court specifically noted that, in adopting the ADEA's bfoq standard (which is identical to Title VII's bfoq provision), "Congress did not ignore the public interest in safety." *Id.* at 419. Similarly, this Court upheld a transit system's safety rule against employing persons who regularly use narcotic drugs, including legally prescribed methadone, because it served the transit system's "legitimate employment goals of safety and efficiency." *New York City Transit Authority v. Beazer*, 440 U.S. at 587 n.31.

The "public interest in safety" necessary to satisfy bfoq requirements under Title VII must extend beyond employees and customers to members of the public who may be affected by a company's normal business operations.[31] Similarly the Fifth Circuit held that a bus company's refusal to accept applications for driver positions from persons between 40 and 65 years of age was a bona fide occupational qualification under the ADEA. *Usery*

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[31] At least three Title VII lower court cases have recognized that concern for fetal life is a legitimate concern of employers. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986 (5th Cir. 1982). These cases were decided under a business necessity analysis. Of significance here is not the analysis used or the particular outcome in these cases, but rather the acknowledgment that the potential harm to the unborn is a significant relevant concern in deciding Title VII employment cases. From a public policy perspective it makes no sense to attempt to sever legitimate societal concerns with safety (in this case harm to unborn children) from the bfoq analysis as Petitioners and some *amici curiae* would argue.

v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). The court recognized:

> the significance of safety to passengers and *members of the public*. We emphasize safety in busing first as we would in a variety of other industrial areas where safety to fellow employees is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb.

Id. at 238 (emphasis added). Nothing in Title VII precludes that consideration. It would be foolish public policy to suggest that it should.

That Title VII is a civil rights statute is unavailing. Concerns with safety heave been prominently considered in federal laws prohibiting discrimination against otherwise qualified individuals on the basis of handicap, as well as cases decided under Title VII and the ADEA. By definition, handicapped individuals suffering from drug addiction or alcoholism are not "otherwise qualified" individuals for employment purposes under sections 503 and 504 of the Rehabilitation Act of 1973 if, because of their condition, employment "would constitute a direct threat to property or the safety of others." 29 U.S.C.A. § 706(8)(B) (West Supp. 1990). Persons currently afflicted with a contagious disease or infection are treated similarly if "by reason of such disease or infection [they] would constitute a direct threat to the health or safety of other individuals." 29 U.S.C.A. § 706(8)(C) (West Supp. 1990). Moreover, in *School Bo[illegible]. Arline*, this Court recognized that it was necessary [illegible]ve "appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." 480 U.S. 273, 287 (1987). In essence, the *Arline* Court concluded that a person whose employment poses a significant health and safety risk to others is not

qualified "to perform the 'essential functions' of the job. 45 C.F.R. § 84.3(k) (1985)." 480 U.S. at 387 n.17.

Precedent provides ample support that the health and safety of others, including fellow employees, customers, and the public, including the unborn, is a significant and legitimate factor in evaluating employer policies under Title VII, as well as other civil rights statutes. As noted by the Solicitor General, Petitioners' argument leads to the extreme conclusion that an employer "could never consider harm to third parties from the manufacturing process [and] would render invalid any gender-based fetal protection policy . . . even if there was absolute certainty of harm to the fetus [in the case of a pregnant woman] from exposure to a toxic substance in the course of employment." *Amicus curiae* Brief for the United States at 9. The bfoq provision in Title VII cannot fairly be read to require such an absolute and harsh result.

B. In the Pregnancy Discrimination Act Congress Did Not Exclude Fetal Protection Policies from the Bona Fide Occupational Qualification Defense.

Petitioners and some *amici curiae* argue that Congress intended the Pregnancy Discrimination Act ("PDA")[32] "to exclud[e] fetal protection concerns from the bfoq defense." Pet. Brief at 42.[33] Petitioners argue that the

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[32] Pub. L. No. 95-555, 92 Stat. 2076 (1978). The Act overruled *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert* the Court held that an employer's failure to cover pregnancy-related disabilities in its disability benefits plan did not constitute discrimination on the basis of sex within the meaning of Title VII.

[33] *See amici curiae* Brief of Equal Rights Advocates, *et al.* These *amici* also contend that the legislative history of the PDA can be interpreted to prohibit employers from taking punitive action (*i.e.*, firing or refusing to hire) against women who independently elect to have an abortion outside of the workplace. *Id.* at 28-30. Assuming *arguendo* that there may be support for that proposition, it does not follow, as *amici* argue, that Congress in-

PDA made it clear "that only performance-related considerations can be taken into account when determining whether women of childbearing capacity are to be excluded from job opportunities." *Id.* at 31. The fundamental flaw in this approach is the implicit assumption that "performance-related considerations" somehow must exclude health and safety concerns, including harm to the unborn, something that society, Congress, and the courts routinely recognize as important and legitimate. Nothing in the PDA or its legislative history supports this conclusion.

Congress passed the PDA to amend Title VII by adding a new definition of sex to section 701. Section 701(k) provides in relevant part that:

> women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (1982). Petitioners seize on the phrase "similar in their ability or inability to work" to conclude that "only performance-related considerations" (Pet. Brief at 31) can be taken into account in judging gender-based distinctions. In effect, Petitioners argue that the term "ability or inability to work" should be

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tended to prohibit an employer from adopting policies designed to minimize the risk of harm to unborn children caused by *its own activities*. Indeed, the PDA specifically allows an employer to exclude abortion from its health benefits plan in all but the most extraordinary circumstances. It follows logically that the PDA cannot be fairly read to require, in effect, that an employer cannot prevent an *employee* from exposing unborn children to harm in its workplace. *Cf. Harris v. McRae*, 448 U.S. 297 (1980) (consistent with the legitimate government interest in promoting childbirth, the federal Medicaid program is not required to pay for abortions).

read to include the phrase "without regard to the safety of third parties (or any other similar concern)." The latter phrase, of course, does not appear in the statute. Because Congress has repeatedly expressed concerns about health and safety in a variety of contexts,[34] any suggestion that such a reading was intended would appear unsupportable. Indeed, safety concerns had been a consideration in interpreting civil rights statutes, including Title VII, prior to the enactment of the PDA in 1978.[35] No inference that Congress intended to exclude safety concerns when it used the words "ability or inability to work" is legitimate.

Petitioners' attempt to rely on legislative history is unavailing. Specific reliance is placed on (i) testimony provided on behalf of an *opponent* of the PDA, and (ii) a single question and non-responsive answer in a hearing record of more than one thousand pages.[36] In his testimony before the Subcommittee on Employment Opportunities of the House Committee on Education and

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[34] *See* discussion in Part I, *supra*.

[35] *See, e.g., Dothard v. Rawlinson, supra* (sex as a bfoq); *Condit v. United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (Title VII—nonpregnancy as a bfoq); *Usery v. Tamiami Trail Tours, Inc., supra* (ADEA—age as a bfoq); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied, Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975) (ADEA—age as a bfoq).

[36] Petitioners' reliance on OSHA (Pet. Brief at 40-41) is also misplaced. Standards developed by other agencies are not accorded conclusive weight under Title VII. *See Western Air Lines, Inc. v. Criswell, supra*; *Johnson v. Mayor of Baltimore*, 472 U.S. 353, 370-71 (1985). There is not a single mention of OSHA in the majority reports or the floor debates on the PDA. In addition, setting standards under OSHA is a time-consuming and controversial process not well-suited to adapt to changes in scientific data and research. *See* Furnish, *Prenatal Exposure to Fatally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 66-74 (1980).

Labor, G. Brockwel Heylin, testifying on behalf of the Chamber of Commerce of the United States, raised the issue of potential harm to unborn children in both written and oral testimony.[37] Petitioners' suggestion that this testimony shows that Congress intended to exclude safety of the unborn is seriously flawed. The Chamber of Commerce *opposed* the PDA.[38] The Chamber's primary concern centered around the potential financial costs associated with mandated changes in employee health and leave benefit plans, not protecting the unborn.[39] Moreover, this latter concern "was not even made the subject of comment by the majority reports or in the debates." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956). "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946).

The other snippet from legislative hearings cited by Petitioners occurred on the first day of the Senate hearings, when Senator Orrin G. Hatch of Utah asked Dr. Andre E. Hellegers, a supporter of the PDA, the following question:

> Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women? [40]

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[37] *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and 6075, Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 84-92 (1977) (statement and testimony of G. Brockwel Heylin).

[38] Even when attributed to members of Congress, "[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). *A fortiori*, the testimony of a witness from the general public who opposed the bill is even less of a guide. *See Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

[39] *See* statement and testimony of G. Brockwel Heylin, *supra* note 37.

[40] *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 67 (1977) (hereinafter "*Senate Hearings*").

Senator Hatch did not mention fetal protection policies, nor offer any view whether he thought the PDA would or should prohibit such policies.[41] Dr. Hellegers did not directly respond to this simple general question. Instead, he took the opportunity to state his concern for the need for increased research on the untoward effects of industrial processes on men, women and the unborn.[42] One commentator has aptly described the exchange between Senator Hatch and Dr. Hellegers as follows: "One senator made a fleeting reference to fetal problems in a question to an expert witness, to which a quick and unedifying response was made . . . . The legislative history is generally lacking in reference to the problem of fetal harm." [43] Petitioner's reliance on the exchange between

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[41] The Chamber of Commerce did not appear during the April, 1977 Senate hearings but did submit a statement for the record more than two weeks after the hearings ended. *See id.* at 481. Given this fact it is difficult to understand the assertion by some *amici* that Senator Hatch "quickly pursued the Chamber's point." Brief of *amici curiae* Equal Rights Advocates, *et al.* at 5.

[42] *Senate Hearings* at 67.

[43] Furnish, *supra* note 36, at 78-79. Later in the hearings Senator Hatch commented to another witness that "[i]f we grant this particular bill we may have OSHA problems that we hadn't thought of, and maybe we should." *Senate Hearings* at 110. Again, Senator Hatch did not specifically mention fetal harm nor did he indicate that he thought the PDA would prohibit fetal protection policies. On the other hand, in other parts of his testimony, Dr. Hellegers made known he was "opposed to abortion" (*Senate Hearings* at 64), and made numerous references to his concern about harm to the unborn (*id.* at 63-80), and "the terrible price we have to pay when we don't take care of infants before they are born" (*id.* at 65). Clearly, Dr. Hellegers supported the PDA because he understood it to protect pregnant women *together with* their unborn children. PDA's chief sponsor in the Senate, Senator Williams, referred during floor debate to the relationship between "loss of income . . . and a deterioration of the health of the pregnant woman and of her child." 123 Cong. Rec. 29386

Senator Hatch and Dr. Hellegers is misplaced. No mention of the question of fetal harm is made in the Senate Committee Report [44] or the Senate floor debate.[45] In construing statutes on delicate and controversial issues, Congressional silence is not a fair basis on which to infer intent. *Girouard v. United States, supra. See Mastro Plastics Corp. v. NLRB, supra.*

On the other hand, the PDA and its legislative history indicate that Congress did not intend to create an exception to Title VII's bfoq provision. When it enacted the PDA, Congress was well aware that health and safety concerns were a relevant consideration in evaluating bfoq defenses, including some cases where nonpregnancy had been raised as a bfoq (*see* cases cited in note 35, *supra*), and that the bfoq provision on its face applied to policies related to sex. The Senate Committee report states clearly that the PDA "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences [pregnancy, childbirth, and related medical conditions] peculiar to women; *it does not change the application of Title VII in any other way.*" [46] This is particularly important because, in enacting the PDA, the Congress clearly knew how to except pregancy (and child-

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(1977) (remarks of Sen. Williams). It would be cynical to assume that Congressional supporters of the PDA, who were widely proclaiming the benefits of the PDA for the well-being of unborn children, at the same time silently intended to eliminate health and safety concerns for the unborn as a relevant consideration in evaluating a bfoq (and other defenses) under Title VII.

[44] S. Rep. No. 331, 95th Cong., 1st Sess. (1977).

[45] 123 Cong. Rec. 29384-89, 29640-65 (1977).

[46] S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) (emphasis added). *See* also H.R. Rep. No. 948, 95th Cong., 2d Sess. 3 (1978) ("[W]e recognize that enactment of H.R. 6075 [the PDA] will reflect no new legislative mandate of the Congress nor effect changes in practices, costs or benefits beyond those intended by Title VII of the Civil Rights Act.").

birth and related medical conditions) from otherwise generally applicable provisions of Title VII.

PDA's new definition of sex included the provision that "nothing in section 703(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k). Like the bfoq provision in section 703(e)(1), section 703(h) contains a provision allowing an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employers if such differentiation is authorized by the provisions of section 206(d) of the Equal Pay Act. 42 U.S.C. § 2000e-2(h) (1982). With the PDA, Congress placed in the statutory definition of sex a specific exception relating to section 703(h). It could have easily done the same thing with respect to the bfoq provision, which on its face applied to sex discrimination claims, but chose not to do so. If any inference is to be drawn from the PDA and its legislative process, it is that Congress did not intend to create an exception to the bfoq provision when it enacted the PDA.

After reviewing the relevant statutory record, Title VII does not preclude Johnson Controls from using its fetal protection policy to avoid the unalterable risks that accompany lead exposure. Against the context of the general legislative demands that businesses be compelled to shoulder the responsibility for public protection against the risks associated with industrial processes, Title VII should not be read as somehow preventing employers from protecting not just their employees, but their offspring and the public, against workplace hazards.

CONCLUSION

For the above stated reasons, the conclusion below that Johnson Controls' fetal protection policy is properly evaluated under Title VII was correct. Therefore, the judgment of the court of appeals should be affirmed.

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